

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 06-1078

(consolidated with No. 06-1035)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS,
PARENTS AGAINST TIRED TRUCKERS, ADVOCATES FOR HIGHWAY AND AUTO SAFETY,
and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents,

AMERICAN TRUCKING ASSOCIATIONS, INC., NASSTRAC, INC., HEALTH & PERSONAL
CARE LOGISTICS CONFERENCE, INC., UNITED PARCEL SERVICE, INC., and THE NA-
TIONAL INDUSTRIAL TRANSPORTATION LEAGUE,

Intervenors.

On Petition For Review of a Final Rule
Issued by the Federal Motor Carrier Safety Administration

**FINAL BRIEF FOR THE INTERVENORS
IN SUPPORT OF RESPONDENTS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

All parties, intervenors, and amici appearing before this Court are listed in the Certificate included with Respondents' brief.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the intervenors state that:

Intervenor the American Trucking Associations, Inc. ("ATA"), a District of Columbia non-profit corporation, is the national trade association of the trucking industry. ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes approximately 2,000 direct dues-paying member trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every size, type and class of motor carrier operation. ATA has no corporate parent and no publicly-held corporation has an ownership interest in ATA.

Intervenors NASSTRAC, Inc. and The Health & Personal Care Logistics Conference, Inc. are non-stock membership corporations, and both are trade associations. Neither corporation has a corporate parent or any outstanding shares, and

no corporation has a 10 percent or greater (or any) ownership interest in either corporation.

NASSTRAC, Inc., incorporated in Delaware, is a trade association whose regular members are shippers of freight, *i.e.*, companies which use transportation services provided by carriers, including motor carriers. The Health & Personal Care Logistics Conference, Inc., incorporated in the District of Columbia, is a trade association whose members—manufacturers of pharmaceuticals and personal care products—are shippers of freight by motor carrier. Both corporations have, for more than 50 years, represented the interests of their members in regulatory and court proceeding involving issues of transportation law, regulation, and policy.

Intervenor United Parcel Service, Inc. (“UPS”) is a publicly held company headquartered in Atlanta, Georgia, and organized and operated under the laws of the State of Delaware. UPS is the world’s largest package-delivery company and a leading global provider of specialized transportation and logistics services. UPS’s primary business is the time-definite delivery of packages and documents throughout the United States and in over 200 other countries and territories. No publicly held corporation owns 10 percent or more of UPS’s stock, nor does any publicly-held corporation other than UPS own 10 percent or more of the stock of any parent, subsidiary, or affiliate of UPS.

Intervenor The National Industrial Transportation League (the “League”) is

the oldest and largest organization in the United States representing the transportation policy interests of shippers who place freight of all kinds onto all modes of transportation. The League is a non-profit corporation under the laws of the District of Columbia. It does not have parent companies and no publicly-held companies have any ownership interest in the League.

(B) Rulings Under Review.

References to the rulings at issue appear in the Certificate included with Respondents' brief.

(C) Related Cases.

Intervenors are unaware of any related cases except for those listed in Respondents' and Petitioners' briefs.

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 500 <i>et seq.</i>
ATA	American Trucking Associations, Inc.
CMV	Commercial Motor Vehicle
DE	Diesel Exhaust
DOT	Department of Transportation
FARS	Fatality Analysis Reporting System
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
HOS	Hours of Service
IIHS	Insurance Institute for Highway Safety
NHTSA	National Highway Traffic Safety Administration
NIOSH	National Institute for Occupational Safety and Health
NPRM	Notice of Proposed Rulemaking
NTSB	National Transportation Safety Board
OB	Opening Brief (Initial Brief for Petitioners)
RB	Respondents' Brief
RIA	Regulatory Impact Analysis
SEC	Securities & Exchange Commission

STATUTES AND REGULATIONS

All applicable statutes and regulations are included in Appendix B to Petitioners' brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

No one denies that large truck safety is important. But Petitioners (hereinafter Public Citizen) do themselves a disservice—and, unfortunately, set the tone for much of the rest of their argument—by opening their brief with misleading atmospherics. Contrasting the fact that “only 3% of vehicles” are large trucks with the fact that “large trucks are involved in 8% of fatal crashes and 12% of traffic fatalities” (OB3), Public Citizen hopes to create a sense of crisis. In fact, however, although large trucks are fewer in number, they account for “7 percent of total vehicle miles traveled” in the United States, which makes it statistically unremarkable that they represent 8 percent of vehicles involved in fatal accidents.¹ NHTSA, *Traffic Safety Facts 2004 Data*, <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2004/809907.pdf>. Indeed, large trucks account for only 3 percent of crashes involving injury and 4 percent of crashes involving property damage (FMCSA,

¹ The Fatality Analysis Reporting System, which “is generally recognized as the most reliable national database on fatal motor vehicle crashes” shows that “[t]he total number of fatal crashes involving large trucks decreased from 3,120 in 2003 to 2,954 in 2004, a 5.3 percent reduction.” JA34. And from 1994 to 2004, the rate of fatal crashes involving large trucks decreased from 2.73 per 100 million miles traveled to 2.15 (a 21 percent reduction). NHTSA, *Traffic Safety Facts 2004*, at 17, <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF2004.pdf>.

2004 Large Truck Crash Overview, <http://ai.fmcsa.dot.gov/CarrierResearchResults/PDFs/2004LargeTruckCrashOverview.pdf>), suggesting that they are *less* likely than other vehicles to be involved in an accident overall, but that an accident involving a large truck is slightly more likely to result in a fatality.

Practices such as this—selective use of statistics, selective quotation, misplaced emphasis, omission of relevant qualifiers or context, and suppression of “unfavorable” facts—are recurring themes in Public Citizen’s brief.² That makes this Court’s role more difficult. Not only must the Court attempt to understand the complex (and almost always conflicting) evidentiary picture before FMCSA, it must do so without the benefit of an accurate presentation by petitioners.

Perhaps Public Citizen concluded that these tactics are warranted because it believes that any conflict in the evidence must be resolved in favor of *its* preconceived notion of a safety- and health-maximizing outcome (*see, e.g.*, OB39). But that is not FMCSA’s statutory mandate (and would not justify Public Citizen’s

² For example, Public Citizen tries to create the impression that FMCSA is suppressing the importance of fatigue in large truck crashes. OB4-5 (noting a reduction in the estimated incidence of fatigue-related crashes from 15 percent in 2000 to 8.15 percent in 2003). In fact, the Campbell study—on which Public Citizen places such great emphasis—indicates that, from 1991 through 2002, fatigue was the primary cause of less than 2 percent of large truck crashes. JA1665. Similarly, NHTSA’s FARS data show that drivers were “drowsy” or “fatigued” in only 1.4 percent of all fatal crashes involving large trucks in 2004. FMCSA, *Large Truck Crash Facts 2004*, at 56, <http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/LargeTruckCrashFacts2004.pdf>.

distortions if it were). Rather, FMCSA appropriately weighed conflicting science, the costs and benefits of various rules, and this Court's analysis of a prior version of its hours-of-service ("HOS") regulations, *see Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004), and promulgated the rule that the agency believed best fulfilled its statutory mandates. Contrary to Public Citizen's misstatement of the standard of review, the final rule adopted by FMCSA is entitled to this Court's deference. *See Part I, infra*. Nothing in Public Citizen's atmospheric, or in its scattershot attacks on the rule, justifies vacating that rule.

In particular, Public Citizen raises two basic challenges to the HOS rule: it argues that the rule does not appropriately protect driver health and that the rule does not adequately reduce driver fatigue. Neither contention has merit.

Because this Court focused on driver health in its 2004 decision, we begin by showing that, as explained in the preamble, the rules are entirely consistent with the agency's statutory mandate to protect driver health. *See Part II, infra*. Public Citizen's complaints are based on a fundamental misunderstanding of the role that driver health must play in FMCSA's rulemaking process. And, as detailed in the Respondents' brief, Public Citizen has systematically overstated the evidence on its side of the debate with respect to each driver-health issue.

Public Citizen's attacks with respect to driver fatigue fare no better. *See Part III, infra*. The new rule represents a significant improvement over the pre-2003

regulatory scheme with respect to driver fatigue, and substantial evidence supports the safety of both 11 hours of driving within a 14-hour tour of duty and the 34-hour restart.

There is strong evidence that an 11th hour of driving has little or no safety effect within a 14-hour tour of duty, and Public Citizen’s invocation of flawed studies to show the contrary is unavailing, especially under the standard of review governing this issue.

And facing compelling evidence that a 34-hour restart will “zero out” any cumulative fatigue—thus justifying “zeroing out” a driver’s weekly driving totals—Public Citizen complains that the rule does not force drivers to get two “traditional” nights of sleep during their recovery periods and allows more total driving and on-duty time each week. This not only overstates the importance of a “traditional” night of sleep but also ignores the fact that most drivers actually are getting two “traditional” nights of sleep during their recovery periods. Moreover, there is no evidence that weekly, monthly, or yearly driving or on-duty hours have any effect on safety.³

³ Public Citizen does not challenge the new short-haul provisions that were included in the 2005 HOS revisions. In the 2005 HOS, FMCSA acknowledged that “[h]istorically, the Federal Motor Carrier Safety Regulations have recognized differences between long-haul and short-haul operations.” JA56. In particular, the agency noted that “fatigue has relatively little impact on short-haul trucking” and that “[s]hort-haul drivers are unique to the motor carrier industry in that they do

ARGUMENT

I. Public Citizen Misstates This Court's Standard Of Review.

Public Citizen acknowledges (OB30) that, under the Administrative Procedure Act (“APA”), this Court reviews the agency’s final rule only to determine whether it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This is, in general, a “highly deferential” standard of review. *Me. Pub. Utils. Comm’n v. FERC*, 454 F.3d 278, 286 (D.C. Cir. 2006); *see also* RB22-23. But in this instance this Court’s review is even *more* deferential than it would otherwise be under the APA because the agency was engaged in a technical analysis of scientific data. As this Court has explained, “‘a reviewing court must generally be at its most deferential’ when examining a ‘scientific determination’ within the agency’s ‘area of special expertise.’” *Board of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214, 1218 (D.C. Cir. 1996) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)); *see also Earthlink v. FCC*, __ F.3d __, 2006 WL 2346459, at *6 (D.C. Cir. Aug. 15, 2006) (“an extra measure of deference is warranted where [a] decision involves a high level of tech-

not drive for long periods of time.” JA57. Consequently, the 2005 HOS revisions included two new provisions for certain short-haul drivers, permitting these drivers to extend their daily 14-hour window by 2 hours twice per week and freeing these drivers from the requirement of keeping records of duty status. *Id.* (encoded at 49 C.F.R. § 395.1(e)(2)). As there has been no challenge to these new short-haul exemptions, they should remain in place regardless of the outcome of this judicial review.

nical expertise in an area of rapid technological and competitive change”) (internal quotation marks and citations omitted).⁴

Rather than acknowledging the extremely deferential nature of this Court’s review, Public Citizen instead asserts that “[m]ore exacting review is appropriate here, where FMCSA arrived at a nearly identical result after this Court vacated the 2003 rule.” OB30. But that is not the rule in this Circuit. Indeed, in *City of Los Angeles v. DOT*, 165 F.3d 972 (D.C. Cir. 1999), this Court **rejected** the argument that “review should be more strict given that the [agency] arrived at the same result on remand as it had reached in its initial decision,” explaining that “that proposition strikes us as flatly inconsistent with the *Chenery* doctrine.” *Id.* at 977. This Court stressed that “while we are mindful that the agency has adhered to the position it first took in the decision that we remanded, our review is still a matter of determining whether the agency’s final decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* at 977-78 (internal quotation marks, citations, and alterations omitted).

⁴ *Accord, e.g., Domestic Secs., Inc. v. SEC*, 333 F.3d 239, 248 (D.C. Cir. 2003) (“we have long held that agency determinations based upon highly complex and technical matters are entitled to great deference.”) (internal quotation marks, citations, and alterations omitted); *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997) (“we review scientific judgments of the agency ‘not as the chemist, biologist, or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.’”) (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976)).

Chamber of Commerce v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006), which Public Citizen invokes in support of its erroneous statement of the standard of review, is not to the contrary. The issue in that case was whether there were **procedural** irregularities tainting the rule reached on remand—in particular, the SEC reissued its new rule within “a matter of days” and “decided it was unnecessary to reopen the rulemaking record for further comment.” *Id.* at 894-895. It was this procedural irregularity that led this Court to be less deferential; as this Court explained, “[r]eviewing the **procedures** through which agencies develop legislative rules falls within the court’s special areas of competence and generally contributes to the rationality and fairness of agency decisionmaking without detracting unduly from its effectiveness.” *Id.* at 899–900 (emphasis added; internal quotation marks and alterations omitted). No such procedural irregularity exists here—the FMCSA issued a new NPRM in this matter, posed a host of questions contemplating various changes to the 2003 rule, and accepted and considered a vast array of additional comments before issuing its revised rule. Thus, the general rule that the deference owed to an agency is not reduced merely because of a prior remand remains applicable here.⁵ See *City of Los Angeles*, 165 F.3d at 978.

Finally, although Public Citizen structures its argument as a series of attacks

⁵ Further, the regulation at issue here differs substantively from the one remanded by the Court. See RB11-12. In *Chamber of Commerce*, the SEC reissued **precisely** the same rule after this Court’s remand. 443 F.3d at 894.

on various separate provisions of the final rule—and we structure our response accordingly—FMCSA emphasized that, although “[t]he provisions [of the rule] are described separately in the preamble,” “they constitute an interconnected whole and cannot be adequately understood in isolation” (JA4). Thus, in conducting its review, this Court too should consider the operation of the HOS rules as an integrated whole.

II. The New Hours Of Service Regulations Do Not Degrade Driver Health.

This Court vacated the 2003 HOS regulations because FMCSA “failed to consider the impact of the rules on the health of drivers, a factor the agency must consider under its organic statute.” *Public Citizen*, 374 F.3d at 1216. FMCSA responded appropriately by conducting a thorough and in-depth examination of the effects of the rules on driver health.

In its petition, Public Citizen expresses its disagreement with some of the agency’s conclusions. Because Public Citizen’s focus is on the agency’s conclusions with regard to specific medical and scientific issues, and “a reviewing court must generally be at its most deferential” when examining a “scientific determination” within an agency’s “area of special expertise” (*Baltimore Gas*, 462 U.S. at 103), Public Citizen’s burden is correspondingly high. Not only does Public Citizen fail to meet that high burden, but its attempt to do so turns on several fundamental misconceptions about FMCSA’s deliberative process in this rulemaking.

A. Public Citizen has misconstrued the statutory standard governing FMCSA’s consideration of the effects of its rules on driver health.

First, Public Citizen’s attack on FMCSA’s conclusions regarding driver health is grounded in the mistaken belief that FMCSA must “‘ensure’—or guarantee—that its rules have no ‘deleterious effect’ on driver health.” OB55; *see also* OB52. As Respondents observe (RB46), that interpretation would have the absurd consequence of requiring FMCSA to prohibit trucking if there are any health risks associated with driving Commercial Motor Vehicles (“CMV”). Instead, although FMCSA’s statutory mandate requires that it consider the effect of its rules on driver health and promulgate regulations with regard to truck operations that do not affirmatively degrade driver health, the agency also is required to balance any health effects with other considerations such as safety and cost. As this Court noted in Public Citizen’s challenge to the 2003 HOS rules, “neither petitioners nor the court suggests that the statute requires the agency to protect driver health *to the exclusion* of [other] factors, only that the agency must consider it.” *Public Citizen*, 374 F.3d at 1217.

Second, Public Citizen’s insinuation that FMCSA’s statute requires it to be more proactive with respect to health than OSHA (OB55-56) similarly is misguided. In OSHA’s statute, “Congress itself defined the basic relationship between costs and benefits, by placing the ‘benefit’ of worker health above all other considerations save those making attainment of this ‘benefit’ unachievable.” *Am. Textile*

Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 509 (1981). By contrast, Congress explicitly directed FMCSA to consider both the costs and benefits of its regulations. *See* 49 U.S.C. § 31136(c)(2)(A). Furthermore, OSHA’s statute directs the Secretary to attain “the highest degree of health and safety protection for the employee.” 29 U.S.C. § 655(b)(5). FMCSA does not operate under a similar directive to affirmatively promote maximum health for CMV drivers. Instead, its mandate is limited to preventing the degradation of driver health by ensuring that “the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.” 49 U.S.C. § 31136(a)(4).

Third, Public Citizen operates under the erroneous assumption that FMCSA is required to solve all issues related to driver health *through HOS regulations*. Although Public Citizen might prefer that any health risk associated with driving be addressed by simply requiring drivers to drive fewer hours—regardless of the cost to the economy—that obviously is not the only available response. The agency regulates many aspects of the trucking industry, and can (and does) address issues relating to driver health through other regulations, as well. *See, e.g.*, JA15 (describing other agency programs to address driver health), JA20 (describing FMCSA’s “fatigue management program”); 49 C.F.R. §§ 391.41-391.49 (establishing physical qualifications and certification procedures for drivers).

Furthermore, the legislative history of the driver-health provision empha-

sized that it is not designed to displace the roles of other “various Federal agencies in ensuring the safety of commercial motor vehicle operations and the health of operators.” S. Rep. No. 98-424, at 9, as reprinted in 1984 U.S.C.A.A.N. 4785, 4793. For example, “the Secretary of Transportation is not responsible for protecting employees from asbestos fibers, and toxic fumes involved in the course of properly repairing a brake, nor for the protection of employees from slippery walking surfaces or from inadequately braked forklift trucks, which activities continue to be the responsibility of the Department of Labor.” *Id.* Thus, FMCSA was acting appropriately, indeed responsibly, when it recognized that the EPA’s regulations of motor-vehicle emissions would continue to reduce any risk there might be from exposure to diesel exhaust (“DE”) emissions. JA15. Similarly, FMCSA was acting appropriately when, instead of imposing hundreds of millions of dollars in costs on the trucking industry by restricting driving hours, it noted that current technological improvements in CMV equipment are addressing health risks that might be associated with DE, noise, or vibration. *Id.*

B. Substantial evidence supports FMCSA’s judgment that the new regulations do not degrade driver health.

FMCSA comprehensively evaluated the effect of the new HOS rules on driver health. It commissioned a team of prominent experts to identify the relevant research on CMV driver health, analyze the research for relevance to the issues involved in the HOS rulemaking, and provide the results of their expert analysis to

FMCSA. FMCSA separately conducted an internal review of studies cited in the 2003 rule, the 2004 litigation, and the 2005 NPRM, as well as some older studies that were not included in the scope of the expert panel's review. Finally, FMCSA assembled an intermodal team of experts on operator fatigue and health from other federal agencies, including the Federal Aviation Administration and NIOSH. JA5-6.

When describing its investigation, FMCSA noted that “relatively little of the available evidence was derived from motor carrier operations,” requiring the agency to extrapolate to the trucking environment. JA5. Nevertheless, the agency conducted a thorough analysis of the effect of the HOS rules, taken as a whole, on seven different aspects of driver health: sleep loss, exposure to DE, exposure to noise, exposure to vibration, risk of cardiovascular disease, effect of long work hours, and the effect of shift work, particularly on gastrointestinal disorders. Public Citizen does not quarrel with the agency's identification of these issues or suggest that FMCSA omitted relevant issues; rather, it simply disagrees with the agency's interpretation of the often conflicting and inconclusive research on these topics.

Resorting to hyperbole, Public Citizen characterizes the relevant medical and scientific evidence as “establish[ing] overwhelmingly” that the HOS rules “imperil drivers' health” (OB29), but FMCSA reasonably reached a different conclusion. As described extensively in the preamble (JA6-16) and Respondents' brief

(RB18-21, 45-52), there is significant evidence supporting FMCSA’s conclusions on each of the driver-health issues it analyzed. Public Citizen’s criticisms are largely based on strategic omissions or misrepresentations. *See* RB45-52. (exposing various errors in Public Citizen’s assessment of the driver-health issues involved in this rulemaking).

Furthermore, such matters of interpretation typically are left to the agency because “[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.” *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also id.* at 53 (“[I]t is within the agency’s discretion to pass upon the generalizability of [scientific] studies” because that “is precisely the type of issue which rests within the expertise of [the agency], and upon which a reviewing court must be most hesitant to intrude.”).

Moreover, because the 2003 HOS rules have been in effect for some time (pursuant to Congress’ ratification), this case presents a rare opportunity to examine the effect of the rules in practice. As detailed in the preamble, the evidence shows that the HOS rules have resulted in drivers getting more sleep (JA5);⁶ have

⁶ FMCSA noted that increased sleep has a number of positive health effects, from reducing the risk of cardiovascular disease to preventing obesity. JA6-7.

promoted, but not restrictively prescribed, a 24-hour work cycle consistent with circadian rhythms (JA15); have decreased daily on-duty time from 15+ hours to no more than 14 hours, which should reduce average daily exposure among truckers to environmental stressors such as noise and DE (*id.*);⁷ have not significantly increased weekly driving or on-duty time (JA8); and have given drivers increased scheduling flexibility, thus decreasing stress, increasing job-satisfaction, and generally “promot[ing] improved driver health” (JA49).

Indeed, because the 34-hour restart in particular has been so successful at lowering drivers’ stress, increasing scheduling flexibility (and particularly time at home), and increasing drivers’ overall job satisfaction (*see* page 33, *infra*), taking away this popular provision at this point might well violate FMCSA’s mandate by degrading driver health. *See* JA44-45 (“Both carriers and drivers said that elimination of the restart provision would be harmful to driver health.”); *see also* JA49.

Of course, these rules are quite new, and any data derived from operations under them is at best preliminary, but, notably, Public Citizen has not identified

⁷ Of course, reducing driving or on-duty time does not necessarily reduce exposure to certain environmental factors. For example, non-driving time spent at a loading dock and off-duty time spent at a truck stop may actually increase exposure to DE. Thus, further restricting driving hours and constraining drivers’ scheduling flexibility—Public Citizen’s preferred response to all health-related issues—may actually *increase* exposure to DE if it results in drivers spending more time stuck “off-duty” at truck stops. At the very least, this is a perfect example of the general principle that HOS rules are not the only, or indeed the best, response to many driver-health issues. *See, e.g.*, JA15.

any evidence that driver health has been *degraded* over the last few years as a result of the 2003 HOS rules.

Finally, all of Public Citizen’s arguments related to driver health turn on the premise that the 2005 HOS rules allow increased weekly and yearly driving and on-duty time. But in conducting its analysis of driver health, FMCSA is not required to assume—counterfactually—that drivers will make use of every possible hour allowed under the rules. “Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.” *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260 (D.C. Cir. 2004) (quoting *Pub. Utils. Comm’n v. FERC*, 24 F.3d 275, 281 (D.C. Cir. 1994)). In other words, “an agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise are entitled to *particularly deferential* review, as long as they are reasonable, and need not rest on pure factual determinations.” *Earthlink*, 2006 WL 2346459, at *9 (internal quotation marks and citation omitted).

Here, FMCSA noted that a survey of drivers under the pre-2003 rules showed average on-duty time of 64.3 hours per week whereas a survey of drivers in 2005 showed average on-duty time of 61.4 hours per week (*i.e.*, an average of 8.8 hours per day on-duty and 15.2 off-duty). JA8. This, and other data, lead FMCSA to conclude that “it does not appear that CMV drivers are working on av-

erage significantly more hours as a result of the 2003 rule as compared to the pre-2003 regulation.” *Id.* If that is true, as FMCSA is entitled to conclude, then there is no greater driver exposure to the health-risk factors identified in the preamble and Public Citizen’s brief, and thus no possible deleterious effect on driver health.

* * * *

In sum, FMCSA reasonably concluded that the new HOS rules have a variety of positive effects on driver health, that the evidence on many health issues associated with driving is inconclusive, that the new rules have not materially increased driving or on-duty time in any event, and that technology and other types of regulation are more effective and appropriate means of dealing with the relevant health issues than are HOS regulations. Public Citizen has failed to undermine any of these conclusions, let alone show that adoption of the rule was arbitrary, capricious, or contrary to FMCSA’s statutory mandate to consider driver health.

III. The Hours Of Service Regulations Reduce Driver Fatigue And Encourage Safety.

Although the evidence on driving hours and safety is conflicting—so that no result would be uncontroversial—FMCSA’s selection of the 11-hour driving limit and 34-hour restart, and its conclusion that the maximum daily and weekly hours they establish are safe, were far from arbitrary and capricious. According to Public Citizen, “HOS rules are unacceptable unless the *maximums* they set are safe.” OB32. But this Court’s role is not to substitute its judgment for the agency’s as to

whether those maximums are safe. Rather, the question before this Court is whether the *agency's* conclusion that these maximums *are* safe was a reasonable resolution of conflicting evidence. *See* pages 5-8, *supra*. The answer to that question plainly is yes.

A. There is substantial evidence that driving 11 hours within a 14-hour window after a 10-hour recovery period is safe.

1. The NTSB found that the most important factors affecting driver fatigue are the time since the driver's last sleep period, the length of the last sleep period, and cumulative sleep within the past 24 hours. *See, e.g.*, JA39. The current regulations are a vast improvement over the pre-2003 rules on each of these factors:

- Under the pre-2003 rules, a driver could still be on the road 15, 16, 17, even 24 hours after his last recovery period. The rules purportedly allowed driving to take place within a 15-hour window, but drivers could indefinitely *extend* that window by going “off-duty” while waiting for cargo to be loaded, eating meals, or performing other non-driving tasks. Under the new rules, no driver can be on the road more than 14 hours after his last recovery period. Because time since the last recovery period (*i.e.*, time awake) is a critical predictor of driver fatigue, this change represents a huge improvement in driver safety.
- Under the pre-2003 rules, a driver could be back on the road for a full day of driving after a recovery period of only eight hours. Under the new regulations, every driver on the road has had 10 hours off before the current day's drive, guaranteeing enough off-duty time to get 7-8 hours of restorative sleep.⁸ Although FMCSA cannot require drivers

⁸ Drivers using a sleeper berth might not have 10 consecutive hours off-duty immediately before the current day's drive, but “sleeper-berth drivers do not need

to sleep during their recovery period—regardless of its length (*see* JA40)—studies suggest that drivers are, on average, getting at least an extra hour of sleep under the new regulations.⁹ For the same reason, the new rules guarantee that drivers will have the opportunity to get more sleep within each 24-hour period.

Public Citizen discounts those positive changes and instead complains that the new rules allow an extra hour of driving during each tour of duty. But there is substantial evidence that the safety effect of an extra hour of driving within a 14-hour tour of duty is negligible or nonexistent. The NTSB did *not* find that time spent driving—as opposed to time awake—was a “critical factor” in predicting fatigue. JA39. And a study of drivers operating under the 2003 regulations, conducted by the Virginia Tech Transportation Institute, found that “drivers are not measurably drowsier in the 11th than the 10th hour of driving” and that there is “no statistically significant difference in the number of ‘critical’ incidents in the 10th and 11th hours of driving.” JA21 (internal quotation marks omitted). Similarly, a pre-2003 study showed “no difference in the amount of drowsiness observed in video records * * * between the 10-hour and the 13-hour driving times,” which lead the authors to conclude that “[t]ime on task was not a strong or consistent pre-

10 consecutive hours off duty in order to have an opportunity for 7-8 consecutive hours of sleep” because “their bedroom travels with them” (JA54).

⁹ Although Public Citizen complains that drivers are getting inadequate sleep under the current regulations—and asserts that drivers are, on occasion, even falling asleep at the wheel (*see* OB6; *see also* IIHS Br. 9)—it never specifically advocates a longer mandatory recovery period, and neither it nor IIHS identifies any evidence that drivers would get more sleep under a different regulatory scheme.

dictor of observed fatigue.” JA17. Indeed, although it adopted a conservative 14-hour tour of duty, the agency noted that “both laboratory and field research studies * * * confirm the ability of drivers to work a 16-hour shift without significant degradation of performance.” JA19; *see also* JA38.

2. Public Citizen discounts the lesson of these studies—that hours spent driving are not as important as hours since the last sleep period—and focuses on two other studies that it claims support its preferred outcome. It is in precisely this type of situation, where there is evidence on both sides of a debate, that deference to the agency’s expertise is highest. *See* pages 5-8, *supra*. Moreover, neither of the studies Public Citizen emphasizes is so compelling or conclusive that it renders FMCSA’s decision arbitrary and capricious.

The Campbell/TIFA study. For all the reasons discussed in the preamble and Respondents’ brief, it is impossible to draw any reliable conclusions from this pre-2003 study. The 9 drivers involved in a fatigue-related accident during the 11th hour of driving could have been on-duty for well over 15 hours at the time of the accident and had significantly less sleep during their preceding recovery period than drivers are able to obtain under the new regulations. Thus, the changes in the HOS rules invalidate the Campbell study as an analysis of driver fatigue under the current regulatory scheme.

Moreover, the Campbell study, which uses TIFA data, does *not* demonstrate

a quantifiable increase in the risk of a fatigue-related crash during the 11th hour of driving. Instead, it shows only that the crashes that occur in the 11th hour of driving are more likely to be fatigue-related. The study does imply that fatigue becomes an increasingly important component of crash risk the longer a driver has been working, but Public Citizen crosses the line by claiming that the study establishes specific quantifiable increases in the risk of a fatigue-related crash in the 11th hour of driving.

For example, Public Citizen claims that the risk of a fatigue-related crash in the 11th hour is “*more than doubled* from the 10th hour” (OB49) and that “the crash risk * * * at 11 hours” is “*nearly 10 times higher*” than the risk in the first hour (OB18). Public Citizen can make these claims only by surreptitiously transitioning from discussion of a “relative risk of a fatigue-related crash” to claims about increased “crash risk.” *See* OB18, 37, 49. But to justify these claims about specific quantifiable increases in the risk of a fatigue-related crash during the 11th hour—as opposed to claims about a general upward trend in the importance of fatigue as a crash-risk factor—the Campbell study would need to record not only the number of crashes in the 11th hour but also the cumulative time driven during that hour by all drivers whose accidents were or would have been captured in the study. Because it did not, it cannot support Public Citizen’s claims.

Finally, even if the study included such information, Public Citizen’s state-

ments about the study would be inappropriate because the minuscule data set for the 11th hour of driving (9 fatigue-related crashes over the course of 10 years) is far too small to justify such specific claims.

The Jovanis/PTI study. Public Citizen emphasizes that the Pennsylvania Transportation Institute study, authored by Jovanis, “found a pattern of increased crash risk” in the 9th through 11th hours of driving. OB19. But Public Citizen omits this study’s qualification of its own results. The authors of this study stressed that, because there were so few data points in the 11th hour of driving, the increased risk in the 11th hour could be as high as 10 or as low as 0.1. *See* JA17; JA1667; JA1611. FMCSA can hardly be criticized for refusing to base public policy on such unreliable results.

Moreover, the Jovanis study is deficient in numerous other respects. For instance, the study relies on data from three motor carriers, but fails to provide any information that permits a determination that these three carriers are representative of the highly diverse trucking industry. In addition, the study fails to provide information on crash characteristics or causation. Accordingly, the study provides an insufficient basis for a conclusion that 11th-hour crashes were fatigue-related or even caused by the driver. In addition, the study failed to control for time-of-day or roadway type.

* * * *

Given the variety of significant limitations in the studies that Public Citizen prefers, the agency clearly was acting within its discretion by concluding that other studies indicating that the 11th hour of driving is safe are more persuasive. *See* pages 17-19, *supra*. For example, the Virginia Tech Transportation Institute study, authored by Hanowski, actually instrumented and measured sleep patterns, driving performance, and visual indicators of drowsiness for 82 drivers working under the 2003 regulations over the course of 16 weeks. JA1576-77. The study found no statistically significant variation in the number of “critical incidents” (*i.e.*, crashes, near-crashes, or crash-relevant conflicts) between the 10th and 11th hour of driving. JA1579-80. Moreover, using objective visual measures of drowsiness at the time of the incident, the study found that drivers involved in a critical incident during the 11th hour of driving were not more drowsy than were drivers in the 10th hour of driving. JA1581.

In sum, there is little evidence that driving in the 11th hour within a 14-hour tour of duty involves an increased risk of fatigue-related crashes, and rather more compelling evidence that it does not.

3. In any event, even if there were an increased crash risk, it would not follow that FMCSA must automatically preclude driving in the 11th hour (just as increased crash risk does not automatically require that the speed limit on interstates be reduced from 65 mph to 15 mph). Instead, contrary to Public Citizen’s

claim that safety should be the agency’s exclusive focus (OB39, 46), FMCSA’s task is to consider *all* relevant factors (with “safety as its highest priority” (*Public Citizen*, 374 F.3d at 1211)), and then to weigh the costs and benefits of various possible rules. *See* JA50 (in addition to safety, “[t]he Agency is also required to consider the economic costs and benefits that the rule would impose on the trucking industry and the public”) (citing 49 U.S.C. §§ 31136(c)(2)(A) and 31502(d)).

Here, even though FMCSA concluded that the evidence regarding an increased risk in the 11th hour of driving is inconclusive, it acted conservatively when conducting its cost-benefit analysis and assumed that there is such an increase. Public Citizen criticizes the manner in which FMCSA accounted for a possible increased crash risk in the RIA (OB46-51), but fails to show that a different approach would have resulted in a recommendation to eliminate the 11th hour of driving. Regardless, its criticisms lack merit.

Public Citizen first attacks FMCSA’s use of a modeling system that does not account for time-on-task effects (even though FMCSA, conservatively, added a time-on-task modifier in response to comments during the notice and comment period). OB46-48. But, as already noted, there is no evidence that time-on-task—as opposed to time since the last sleep period (which is dramatically reduced under the new regulations)—has a significant effect on driver fatigue. In other words, there is no evidence that a driver who has been driving for 11 hours will be more

fatigued than a driver who spent the first five hours of his tour of duty on other tasks and only the last six hours driving. (Indeed, we are aware of no study in the record making the relevant comparison and Public Citizen certainly has not cited one.) Nevertheless, acting conservatively, FMCSA attempted to construct time-on-task multipliers from the TIFA data. JA1678-81. Public Citizen calls this effort “jury rigging” (OB48) but does not suggest a more appropriate method of incorporating this dubious factor into FMCSA’s calculation. That is unsurprising because, as noted, there are no data establishing a time-on-task effect, let alone data providing a quantifiable assessment of its alleged impact on safety.

Public Citizen then rolls out an argument that is a remarkably cogent justification for deference to agency expertise. Public Citizen claims that it has come up with a better curve to fit the TIFA data. OB49-50, A-3; *see also* IIHS Br. 10-12. Although Public Citizen’s proposed curve (OB at A-3) comes closer to the data point for the 11th hour of driving (thus, apparently, fulfilling its purpose), it is obviously not a better fit for the data overall. First, the increase in fit with respect to the 11th hour is completely offset by a corresponding decrease in fit with the 12th-hour data point. Far more important, Public Citizen’s curve is obviously a worse fit for the 1st through 8th hours of data even though, as FMCSA emphasized, those early data points are much more reliable than the data for the 11th hour (which is based on only 9 fatigue-related accidents over 10 years). Moreover, Public Citi-

zen's curve has an unexplained shift from convex to concave curvature (an inflexion point) that suggests, implausibly, that driving becomes more dangerous over time between the 1st and 4th hours of driving, then becomes increasingly *more safe* between hours 4-7, and finally becomes increasingly more dangerous again starting at hour 7 or 8. Finally, Public Citizen's rationale for its curve makes no sense. Public Citizen acknowledges that the TIFA study used a single category for all data involving more than 12 hours of driving. This suggests that the best strategy for fitting a curve would have been to omit the ambiguous data entirely (because no placement of this data point is "accurate").

Ironically then, Public Citizen's result-oriented "best fit" highlights the very reasons that decisions such as this are entrusted to an agency with appropriate expertise. *See, e.g., W. Va. v. EPA*, 362 F.3d 861, 867-68 (D.C. Cir. 2004) ("Agency determinations based upon highly complex and technical matters are entitled to great deference. * * * This is particularly true when we review the use of computer models because their scientific nature does not easily lend itself to judicial review.") (internal quotation marks and citations omitted).

In sum, there is substantial evidence supporting FMCSA's conclusion that 11 hours of driving within a non-extendable 14-hour tour of duty is safe. The two studies identified by Public Citizen are insufficient to render the agency's conclusion arbitrary, especially in light of the substantial methodological flaws and pre-

dictive limitations of those studies. And Public Citizen’s criticism of FMCSA’s conservative effort to incorporate a time-on-task effect into its cost-benefit calculus, despite the absence of evidence proving such an effect, serves only to emphasize the need for deference to agency expertise.

B. There is substantial evidence that a 34-hour restart will “zero-out” any accumulated fatigue.

Drivers with a guaranteed 10-hour recovery period between each 14-hour tour of duty should not accumulate fatigue. If drivers obtain 7 to 8 hours of uninterrupted restorative sleep each day—as they are guaranteed the opportunity to do under the 2005 HOS rules—they will not accumulate fatigue and will not need more than the daily 10-hour recovery period to maintain safe operations. *See, e.g.*, JA47, JA62.

Nevertheless, recognizing that drivers may not always obtain adequate sleep on a daily basis (even when they are guaranteed the opportunity to do so), FMCSA retained the pre-2003 weekly on-duty limits and established a failsafe 34-hour recovery period. The 34-hour “restart” provides drivers the opportunity to recuperate from any fatigue they have accumulated due to ineffective use of their daily recovery periods. Public Citizen argues that 34 hours is insufficient to allow full recovery and complains that the flexibility afforded by the restart period allows more weekly driving time than did the pre-2003 regulations. OB39-45. But there is significant evidence that a 34-hour recovery period will “zero out” any cumulative fa-

tigue and no evidence that increased weekly driving or on-duty hours create a safety risk so long as drivers are adequately rested.

1. A 34-hour recovery period will “zero out” cumulative fatigue.

Although, as consistently is the case in this proceeding, there is conflicting evidence on the amount of time required to “zero out” cumulative fatigue, FMCSA did not act arbitrarily when it concluded that, “[i]n balance, most of the research with CMV drivers supports the assessment that a recovery period of 34 consecutive hours is sufficient for recovery from moderate cumulative fatigue.” JA19.

Public Citizen’s criticism of the 34-hour restart represents an unfortunate pattern in its brief. It recognizes that there is conflicting data on this issue, but claims that the studies supporting its preferred outcome “undermine” what it characterizes as FMCSA’s “effort to generate ambiguity” (OB42) and “sow confusion” (OB43) by discussing both sides of the conflicting evidence. Of course, FMCSA has a statutory mandate to consider both sides of the dispute. And it is precisely when the underlying evidence *is* ambiguous or confusing that this Court is most deferential to the agency’s expertise. *See* pages 5-8, *supra*. Public Citizen cannot overcome that deference by simply pointing out that there was evidence supporting its preferred outcome, especially when it cannot deny that there is countervailing evidence that supports the final rule.

In fact, of “five studies that provided information regarding the recovery

time needed for CMV drivers after working a long week,” four supported “recovery periods of 34 hours or less.” JA18. Indeed, two of those studies “suggest that a single 24-hour period is sufficient time for a driver to recover from any cumulative fatigue.” *Id.* Only one study concluded that 34 hours is inadequate (the Wylie study found that even 48 hours is insufficient), but the authors of that study concluded that it had only limited predictive value. JA48. Moreover, as FMCSA noted, the Wylie study was conducted under the pre-2003 rules so that the drivers in the study likely suffered from much greater cumulative fatigue than drivers operating under the 2005 HOS rules. *Id.* In sum, the great weight of the evidence supports FMCSA’s conclusion that a 34-hour recovery period provides enough time to “zero out” any cumulative fatigue so that “[f]rom a physiological perspective * * * a driver would be considered to have zero sleep loss, acute or cumulative, and be appropriately rested for duty.”¹⁰ JA43 (comments of Alertness Solutions).

Public Citizen also complains that a 34-hour restart is insufficient because drivers are not guaranteed two periods of sleep from midnight to 6 a.m. OB42-45. As an initial matter, although the literature and FMCSA use the “traditional” sleeping period of midnight to 6 a.m. as a guidepost to represent the impact of circadian rhythms, there obviously is no magic in these numbers. Public Citizen cites no

¹⁰ During the rulemaking, 113 out of 132 commentators, 86 percent, said that the 34-hour restart provision “is long enough to provide sufficient restorative sleep.” JA42.

studies showing that a full night of sleep is somehow rendered non-restorative unless it begins between 10 p.m. and midnight (*i.e.*, that sleep from 9 p.m. to 5 a.m. or from 1 a.m. to 9 a.m. is “ineffective”).

Regardless, the evidence shows that drivers actually are getting the opportunity for two “traditional” nights of sleep when they make use of the restart provision. First, because the majority of drivers work in the daytime (JA41; RB37-38), they normally will begin the 34-hour restart period at the end of a shift, in the evening, thereby allowing for two “traditional” nights of sleep during the restart period. Second, after two years of experience with the 2003 rules we know that most drivers take restart periods that are significantly longer than 34 hours—50 percent are longer than 58 hours (JA46)—so that even if the recovery period does not begin in the evening, it still will cover two “traditional” sleep periods.

Public Citizen has not shown—and cannot show—that the speculative risk created by a few drivers who (i) are guaranteed adequate time to obtain restorative sleep on a daily basis both before and after their recovery period, (ii) take 34 consecutive hours off-duty, but (iii) get only one “traditional” sleep period during that 34-hour period, is so significant that it justifies requiring all drivers to add 12 or 24 hours to their restart period regardless of their situation (*e.g.*, even when they have been getting 7-8 hours of sleep every night, have already had two “traditional” sleep periods during a 34-hour recovery period, and are stuck at a truck stop trying

to “earn” the driving time to get home). Moreover, while emphasizing its criticisms of the final rule, Public Citizen ignores completely FMCSA’s analysis of the safety-related costs associated with alternative regulatory schemes. For example, FMCSA concluded that “mandating a midnight to 6 a.m. off-duty period for all CMV drivers would have the unintended consequence of substantially increasing the number of heavy vehicles in daytime traffic, creating greater hazards for the average motorist simply because of the higher density of vehicles.” JA49; *see also* JA45, JA47.

2. *The increased weekly driving hours are safe.*

Just as it did with its introduction (*see* pages 1-2, *supra*), Public Citizen opens the argument section of its brief with misleading atmospherics:

FMCSA attempts to evade its obligation to demonstrate that higher driving limits are safe by claiming that drivers cannot “realistically” drive the longer daily and weekly hours permitted by the 2003/2005 rule. 70 FR 50010, 50022, 50039-40. In other words, the new maximums, especially for weekly driving hours, are *so high* that FMCSA does not see how truckers can possibly use them.

OB30. That argument is deceptive in two respects. First, the actual conclusion reached by FMCSA was that “*the average driver* is not, and cannot realistically, drive and work the longer weekly hours, *on a regular basis*, as described by some of the commenters.” JA46 (emphasis added). Second, contrary to Public Citizen’s implication, FMCSA did *not* reach this conclusion because the weekly hours allowed under the 2005 HOS rules are “so high.” Indeed, FMCSA’s statement has

nothing to do with driver fatigue. Instead, it is an observation about the logistics of trucking. *See id.* (“To reach the maximum driving or driving and on-duty hours requires that nearly perfect logistics for picking up and delivering a load are routinely in place; in other words, total elimination of waiting time to load, mechanical and equipment problems, and traffic- and weather-related delays.”).

Public Citizen’s recourse to misdirection at this point is disappointing but not surprising. In fact, there is no evidence that increased weekly driving or on-duty hours create a safety risk so long as drivers are well-rested, and the new rule provides ample opportunity for sleep on a daily basis.¹¹ *See* JA43-44, JA47-48.

Attempting to create support for its preferred outcome, Public Citizen cites a series of studies finding cumulative fatigue in the later days of a multi-day drive. OB40-41. Those studies are irrelevant, however, because the 34-hour restart spe-

¹¹ It should be noted that, when the original weekly limits were adopted, the government acknowledged that it did not have a scientific basis for the limits it selected. *See Ex Parte No. MC-2, In the Matter of Maximum Hours of Serv. of Motor Carrier Employees*, 6 M.C.C. 557, 561 (1938) (noting absence of “statistical or other information”); *see also Ex Parte MC-2, In the Matter of Maximum Hours of Serv. of Motor Carrier Employees*, 3 M.C.C. 665 (1937); *id.* at 670. In the instant rulemaking, commenter Alertness Solutions characterized the weekly limits as “an arbitrary constraint in [the] physiological context.” JA43. The lack of scientific foundation for the weekly limits eases the burden that FMCSA must meet to justify the 34-hour restart. *See Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1349 (D.C. Cir. 1985) (the justification for a rule change “need not consist of affirmative demonstration that the status quo is wrong; it may also consist of demonstration, on the basis of careful study, that there is no cause to believe that the status quo is right, so that the existing rule has no rational basis to support it”).

cifically addresses and “zeroes out” the cumulative fatigue that may be acquired over multi-day driving.¹² See pages 27-30, *supra*. The only remaining question is whether an adequately rested driver is at increased risk of causing an accident simply by virtue of having done more driving during the past week, month, or year. To put it in terms of Public Citizen’s charts A-1 and A-2, the question is whether driving done during the first half of the week has any impact on driving done at the end of the week after the intervening 34-hour restart that “zeroes out” any cumulative fatigue. Public Citizen has not identified even a single piece of evidence finding such an effect, let alone established that this effect is so significant that it renders FMCSA’s adoption of the restart provision arbitrary and capricious.

Public Citizen also misrepresents the record by claiming that “[t]he 34-hour restart legalizes practices FMCSA previously found unsafe.” OB41 (citing the 2000 NPRM). In the 2000 NPRM, FMCSA criticized drivers who were breaking the law by driving 75 hours in 7 days, 15 hours over the legal limit. JA602. Moreover, the drivers logging those hours did not have adequate recovery times between each tour of duty and could effectively extend their daily on-duty time by going off the clock. FMCSA did *not* conclude, and never has concluded, that driving 75 hours in a week is dangerous for someone who gets adequate daily recovery time,

¹² Moreover, with one exception, those studies were conducted before the 2003 HOS revisions guaranteed drivers the opportunity to obtain a full 7-8 hours of restorative sleep each night.

operates within a non-extendable 14-hour daily work period, and gets adequate periodic recovery from cumulative fatigue.

Finally, Public Citizen's claim that the 34-hour restart "provides no benefit to drivers" (OB40) and its attempt to portray the 34-hour restart as anti-driver (OB44-45) are belied by the opinions of drivers themselves. Eighty-two percent of drivers support the 34-hour restart and 67 percent rate it the "most liked" aspect of the new HOS rule." JA41. That is unsurprising because the restart gives drivers much greater flexibility, including the ability to schedule their down-time at home rather than wherever they happen to be when their weekly allotment of hours runs out.

CONCLUSION

Because Public Citizen has failed to show that FMCSA acted arbitrarily, capriciously, or contrary to law in its consideration of driver health and its adoption of the 11-hour driving limit and 34-hour restart, the petition for review should be denied.

Respectfully Submitted.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) AND
CIRCUIT RULE 32(a)(3)(B)(i)**

I hereby certify that—according to the word-count facility in Microsoft Word—this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 8,386 words and thus complies with Circuit Rule 32(a)(3)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2006, I served copies of the foregoing Final Brief for the Intervenors in Support of Respondents by e-mail and overnight delivery on Petitioners, Respondents, and *amici* herein at the following addresses:

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